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SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 950

**BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEERS,
ET AL., Appellants**

v.

**CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
ET AL., Appellees**

No. 973

**ROBERT N. HARDIN, PROSECUTING ATTORNEY FOR THE SEVENTH
JUDICIAL CIRCUIT OF ARKANSAS, ET AL., Appellants**

v.

**CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
ET AL., Appellees**

Appeals from the United States District Court for the
Western District of Arkansas

BRIEF FOR THE APPELLANTS

**JAMES E. YOUNGDAHL
ROBERT D. ROSS**
711 West Third Street
Little Rock, Arkansas 72201
Attorneys for the Appellants (950)

JOE PURCELL
ATTORNEY GENERAL OF ARKANSAS

LESLIE EVITTIS
CHIEF ASSISTANT ATTORNEY GENERAL OF ARKANSAS
Justice Building
Little Rock, Arkansas 72201
Attorneys for the Appellants (973)

Of Counsel:

JOHN P. SIZEMORE
MCMATH, LEATHERMAN, WOODS & YOUNGDAHL
POPE, PRATT, SHAMBURGER, BUFFALO & ROSS
Little Rock, Arkansas

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OPINION BELOW

The Memorandum Opinion of the District Court for the Western District of Arkansas (A. 1188) is reported at 274 F.Supp. 294.

JURISDICTION

The Decree of the District Court was entered on October 2, 1967. A. 1207. Notice of Appeal was filed on October 31, 1967. A. 1209. Jurisdictional Statements were

ANN. §§ 73-723 through 725, 73-726 through 729 (Repl. 1957). This concept, as well, became integral to Arkansas civil litigation. *E.g.*, *Missouri Pac. R.R. v. Moore*, 210 Ark. 643, 197 S.W.2d 284 (1946).

The chapter was expanded further in 1911, 1915 and 1917. Some provisions were enacted in contemplation of the crew composition required by the 1907-13 statutes; locomotives, for example, must be constructed so that "the engineer and fireman will be located under the same roof of engine cab at all times" while on duty. ARK. STAT. ANN. § 73-701 (Repl. 1957). The importance of signals, switches and car construction was emphasized by legislative standards. *E.g.*, ARK. STAT. ANN. §§ 73-708, 711, 714 (Repl. 1957).

Modern revision of the railroad safety chapter began in the 1950's. Adequate head and tail lights became obligatory for track motor cars used for employee transportation in 1951. ARK. STAT. ANN. § 73-740 (Repl. 1957). In 1953, locomotives and cabooses were required to have first aid kits, "sanitary drinking cups and pure ice cooled drinking water, dispensed from a suitable sanitary container." ARK. STAT. ANN. §§ 73-741 through 744 (Repl. 1957).

The legislature responded to conditions of contemporary railroading by excisions as well. In 1961 beneficiaries of the duty of all persons running trains to keep a constant lookout were redefined as "all persons, including licensees and trespassers, and property." ARK. STAT. ANN. § 73-1002 (Supp. 1967). The code section immediately succeeding the full crew laws was repealed after the inception of this litigation. ARK. STAT. ANN. § 73-730 (Supp. 1967). No longer, the lawmakers decided in 1965, should freight cars at the end of passenger trains be banned by a 1868 enactment.

filed on December 26 and 29, 1967. A. 1209. Probable jurisdiction was noted on March 4, 1968; the appeals in No. 950 and 973 were consolidated. A. 1209. The jurisdiction of the Supreme Court to review the decision on direct appeal is conferred by 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U. S. CONST. art. I, § 8, cl. 3; art. VI, § 2; and amend. XIV, § 1, are set forth as Appendix A hereto.

ARK. STAT. ANN. §§ 73-720 through 722, 73-726 through 729 (Repl. 1957), are set forth as Appendix B hereto.

QUESTION PRESENTED

In view of consistent prior legislative and judicial approval, have conditions of Arkansas railroading so changed that the Constitution of the United States now deprives the State of Arkansas of power to enforce aspects of its railroad safety laws which regulate the employment complement of certain freight and switch train crews operating in the state?

STATEMENT OF THE CASE

The statutes challenged in this case were passed by the General Assembly of Arkansas to delineate minimum train crews for certain conditions of railroad operation in the state.

ARK. STAT. ANN. §§ 73-720 through 722 (Repl. 1957) require a minimum crew of an engineer, a fireman, a conductor and three brakemen for freight trains, except for small companies and short trains. ARK. STAT. ANN. §§ 73-726 through 729 (Repl. 1957) require a minimum crew of an engineer, a fireman, a foreman and three helpers for switch trains operating across public crossings in urban communities, except for small companies.

Six large interstate railroad companies initiated this action before a three judge court in the Western District of Arkansas on April 10, 1964. Their complaint sought an injunction against enforcement of the statutes applicable to freight and switch crews, as violative of the Fourteenth Amendment and the commerce and supremacy clauses of the United States Constitution.

The complaint conceded that the Arkansas statutes have been upheld in the past against similar contentions, but alleged that changes in operating conditions and expanded federal occupation of the field make prior holdings inapposite. The primary basis for the latter argument was the 1963 passage of Public Law 88-108, 77 STAT. 132, 45 U. S. C. following § 157.

Intervention was granted to five operating brotherhoods, unions which represent several thousand employees of the plaintiff railroads in Arkansas. The brotherhoods and the Attorney General of Arkansas denied all vital allegations of the complaint, and alleged that the challenged statutes protect the public safety in a manner within the power of the state to effectuate. Discovery

proceedings were suspended upon the filing by the railroads of a motion for summary judgment based upon supremacy clause, commerce clause and equal protection issues. The supremacy clause contention was found sufficient, the court holding the Arkansas statutes "in substantial conflict with Public Law 88-108 . . . and the proceedings thereunder, and . . . therefore unenforceable." *Chicago, R.I. & Pac. R.R. v. Hardin*, 239 F.Supp. 1 (W.D. Ark. 1965).

The Supreme Court reversed, finding that Congress did not intend to supersede the state minimum crew laws. *Brotherhood of Locomotive Engineers v. Chicago, R.I. & Pac. R.R.*, 382 U.S. 423 (1966). The Court noted that a three judge court was justified in view of the various constitutional contentions of the railroads, and found a discrimination against interstate commerce argument by the railroads "without merit" on the record before it. 382 U.S. at 428, 437-38.

On the remand for trial of the remaining issues, after full evidentiary presentations by all parties the District Court again invalidated the statutes on October 2, 1967. *Chicago, R.I. & Pac. R.R. v. Hardin*, 274 F. Supp. 294 (W.D.Ark. 1967). It enjoined enforcement of the legislation unconstitutional as violating the due process clause of the Fourteenth Amendment and the commerce clause of Article I of the Constitution of the United States.

On October 21, 1967, Mr. Justice Byron R. White stayed the injunction pending the disposition of the appeals. On March 4, 1968, probable jurisdiction was noted for consolidated appeals of the brotherhoods and the state.

SUMMARY OF ARGUMENT

The challenged statutes are viable legislative judgments in areas of historic state concern.

Full crew laws are a small portion of Arkansas railroad safety laws. The statutory chapter has been considered at length and in detail by the legislature without change in the full crew requirements.

In 1958 the railroads made a major effort to repeal the statutes by initiated petition, using the same arguments that are now being presented to this Court. The people of Arkansas voted against repeal by a substantial margin.

The federal Congress also has considered the merits of the crew consist issue. It made a calculated decision not to preempt the operation of such statutes. *Brotherhood of Locomotive Engineers v. Chicago, R. I. & Pac. R.R.*, 382 U.S. 423 (1966). The reason for such decision is further indication of rational legislative support.

The challenged statutes have received consistent authoritative judicial validation in response to legal contentions identical to those at bar.

In addition to the 1966 decision in the instant case, Arkansas full crew laws have been challenged on many occasions. Invariably, they have withstood commerce clause, preemption, due process and equal protection constitutional challenges. *Chicago, R.I. & Pac. Ry. v. Arkansas*, 219 U.S. 453 (1911); *St. Louis, I.M. & S. Ry. v. Arkansas*, 240 U.S. 518 (1916); *Missouri Pac. R.R. v. Norwood*, 283 U.S. 249 (1931). They were noted with approval in 1945 in a leading commerce clause case. *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 779 (1945).

State courts, relying on such decisions of this Court, have validated full crew laws in several jurisdictions,

particularly in recent years. *New York Cen. R.R. v. Lefkowitz*, 259 N.Y.S. 2d 76 (Sup. Ct. 1965), *affmd.*, 282 N.Y.S. 2d 68 (App. Div. 1967); *Public Service Commn. v. New York Cen. R.R.*, 216 N.E. 2d 716 (Ind. 1966), *cert. den.*, 385 U.S. 843 (1966).

In view of this authoritative judicial history, the only open inquiries concern changes in railroad practices which might affect crew consist, and current costs of compliance.

The railroads have failed to prove that the challenged statutes have become unnecessary and arbitrary under present conditions.

As to the first open issue, the railroads have failed to establish changed conditions or technology which eliminate or reduce significantly the hazards to which full crew laws are related.

The fireman in fact performs crucial functions such as maintaining the motive power, keeping a lookout, relief, inspection and emergency duties. The brakemen, whose employment was litigated extensively in 1931-33 in the *Norwood* cases, have duties that are substantially the same, and just as necessary, now as then.

Examination of the details of alleged changes in railroad equipment and facilities likewise shows no changes which materially affect full crew safety considerations. Most of the "modern" developments alleged by the railroads either were in effect at the time of *Norwood*, or are of speculative value in view of their limited actual use in Arkansas. Justification for the challenged statutes is also found in acceleration of certain hazards with a proximate relation to crew consist.

The railroads have failed to prove that the cost of compliance with the challenged statutes has become unreasonably burdensome under present conditions.

The most dramatic failure of proof concerns cost of compliance. The railroads simply add up the wages and fringe benefits of the fireman and one brakeman. The decision of this Court in *Norwood* teaches the first defect in this presentation: to be meaningful, employment cost must be established by relating a unit of wage cost to the amount and kind of work performed.

Most important, the railroads have failed to mention any offsets, costs that would be incurred if the Arkansas statutes were invalidated. From figures accidentally made available, the gravity of such offsets becomes apparent. The cost per Arkansas mile for operating crews has maintained the same ratio to the cost per mile in the system as a whole during a period which includes the substantial national crew reduction beginning in 1964.

The challenged statutes are reasonably related to state interests in the operation of Arkansas railroads.

At least two new positive bases of support for the full crew laws are apparent from the record.

First, statistics establish four propositions beyond serious challenge: railroading is a hazardous business; railroad accidents have increased substantially since 1964; operating crews have been reduced substantially since 1964; and the most significant accident increase since 1964 has been in that kind most related to employee performance or non-performance.

Second, one consideration which dominates the testimony of working railroaders is the problem of speed. Railroads press their employees for faster operation, but all witnesses concede that a smaller crew makes operating

time longer. Nothing in the railroad safety record justifies leaving resolution of the tension between these two concepts to the railroads themselves.

Each of these points establishes the reasonableness of the legislative judgment in retaining the challenged statutes.

Analysis of the challenged statutes under any other constitutional characterization also compels judicial validation.

The alternative ground used by the court below, burden on commerce, is subject to the same infirmities as the due process characterization. Further, in discussing it the court reveals a general erroneous attitude towards the case in that an essentially legislative judgment is made.

There is no reason for the established principle of judicial abstention from legislative decisions not being applicable here. See *United States v. Carolene Products Co.*, 304 U.S. 144 (1938); *Williamson v. Lee Optical*, 348 U.S. 483 (1955).

The railroads have announced a plan to argue about classification infirmities, under discrimination against commerce and equal protection theories. The classifications are not contiguous as an interstate-intrastate dichotomy. Exemption on a total mileage basis is supported by factors such as length and speed of trains and ability to pay the alleged cost of compliance. A distinction from other forms of transportation is obvious from the nature of the industry, and indicated by the absence of plenary federal control over railroads.

ARGUMENT

I. THE CHALLENGED STATUTES ARE VIABLE LEGISLATIVE JUDGMENTS IN AREAS OF HISTORIC STATE CONCERN.

A.

The two full crew laws¹ in dispute comprise a small portion of Chapter 7 of Title 73 of the Arkansas Statutes, entitled "Equipment of Railroads—Safety Provisions." ARK. STAT. ANN. §§ 73-701 through 744 (Repl. 1957). The history of the chapter demonstrates development by Arkansas lawmakers of an integrated pattern of protection for citizens of the state from the hazards of railroad-ing.

The earliest and most-applied sections are 1868 rules² for sounding bells and whistles and placing warning signs at public crossings. ARK. STAT. ANN. §§ 73-716, 717 (Repl. 1957). Testimony of an engineer and fireman about compliance with such requirements may be decisive in personal injury actions. *E.g., Kansas City S. Ry. v. Edwards*, 224 Ark. 124, 271 S.W.2d 935 (1954).

A major contribution to Arkansas jurisprudence was the enactment, in 1891, of the statute establishing a duty to

¹ Any characterization of these statutes risks reflection of partisan vigor intrinsic to a dispute which has raged for over a century. See Weber, *Public Policy and the Scope of Collective Bargaining*, 13 LAB. L. J. 49 (1962). The term "full crew laws" seems preferable to others available such as "excess crew laws" or "full safety crew laws." See A. 759, 1144; *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 779 (1945); *Brotherhood of Locomotive Engineers v. Chicago, R.I. & Pac. R.R.*, 382 U.S. 423, 434 (1966).

² State railroad regulation began in 1838, in Rhode Island. STOVER, *THE CHICAGO HISTORY OF AMERICAN RAILROADS* 125 (1961).

keep a lookout. ARK. STAT. ANN. § 73-1002 (Repl. 1957).³ The duty thereby imposed for "all persons running trains in this State upon any railroad, to keep a constant lookout for persons and property upon the track of any and all railroads" has been a fount of litigative development throughout ensuing decades. (Emphasis added.) *E.g.*, *Overstreet v. Missouri Pac. R.R.*, 195 F.Supp. 542 (W.D.Ark. 1961) (personal injury judgment for defendant based on satisfaction of lookout duty by members of full crew).

In 1907 substantial additions were made to the railroad safety chapter. Full crews were required on freight trains. ARK. STAT. ANN. §§ 73-720 through 722 (Repl. 1957). Headlight standards were specified. ARK. STAT. ANN. §§ 73-704 through 706 (Repl. 1957). Trains were not permitted to obstruct crossings for more than ten minutes; violation is ground for civil liability as well as criminal penalty. ARK. STAT. ANN. §§ 73-718, 719 (Repl. 1957); *St. Louis, I.M. & S. Ry. v. Wells*, 102 Ark. 257, 143 S.W. 1069 (1912).

The principle of full crews was extended to passenger⁴ and switching operations in 1909 and 1913. ARK. STAT.

³ The lookout statute is part of a separate statutory chapter entitled "Liability for Injuries to Persons or Property through Operation of Railroads." ARK. STAT. ANN. §§ 73-1001 through 1015 (Repl. 1957). Statutes dealing primarily with motorists also complement railroad safety provisions. *E.g.*, ARK. STAT. ANN. § 75-642 (Repl. 1957), requires railroad companies to place special signs at crossings designated as hazardous by public officials. A complete chapter deals with "Duties of Railroads with Respect to Employees." ARK. STAT. ANN. §§ 73-901 through 922 (Repl. 1957).

⁴ Since the railroads are here contending that the statutory full crews make railroad operations *more* hazardous (*e.g.*, A. 11, 131), the omission of the full passenger-crew law from this challenge is illogical, at best. It requires a crew of an engineer, a fireman, a conductor, a porter and a flagman or brakeman for obviously shorter trains uninvolved in complicated switching operations. Perhaps the failure of one previous repeal endeavor which encompassed the passenger crew statutes suggested deletion as more palatable public relations. See *Hope v. Hall*, 229 Ark. 407, 408, n. 1, 316 S.W.2d 199, 200 (1958).

In the face of extensive legislative consideration of the railroad safety chapter and related statutes, retention of the full crew laws is notable.⁵ In any event, the railroads employed an alternative procedure in a 1958 effort to repeal all Arkansas full crew laws by initiative petition.

"An Act to Repeal the Full Crew Laws" was initiated for popular vote at the General Election of 1958. *Hope v. Hall*, 229 Ark. 407, 316 S.W.2d 199 (1958). Its preamble contained the same entreaties the railroads now address to this Court:

WHEREAS, Arkansas is one of the relatively few states which by law prescribe minimum crews on certain trains operating in the state, thus resulting in higher operating expenses to the railroads in Arkansas than in neighboring states, all to the detriment of shippers and the traveling public; and

WHEREAS, railroads now have improved roadbeds and grades and have developed and now use equipment that can be operated with safety to the public and the employees with smaller crews than prescribed by law. . . .

229 Ark. at 408, n. 1, 316 S.W.2d at 200.

The railroad proposal cleared a challenge to the sufficiency of its ballot title, but could not survive the decision of the people. On November 4, 1958—five decades after their enactment and only one decade ago—Arkansas full crew laws were reaffirmed, 162,748 to 130,465. DX 2.⁶

⁵ Arkansas does not maintain official or unofficial reports of legislative history.

⁶ In an effort to avoid a lengthy trial before the three-judge court or reference to a master, the parties agreed to a pre-trial procedure whereby much of the testimony would be presented by written statement, with cross examination, where desired, by deposition. Such documents were received at trial as though the wit-

B.

Extensive federal legislative consideration of crew consist problems, beginning in 1964, is not without significance for the constitutional issues remaining in this case. Congress did not intend to preempt state full crew laws. *Brotherhood of Locomotive Engineers v. Chicago, R.I. & Pac. R.R.*, 382 U.S. 423 (1966). The reason for such legislative abstention is additional support for the statutes under attack.

Congress was presented with substantial evidence about the effect of the consist of railroad crews upon safety; presentations of the parties, in fact, closely paralleled those of the instant case.⁷ *E.g., Hearings on S.J. Res. 102*

nesses had appeared in person. A. 43-44. Symbols used to designate these and other exhibits are:

- PX: Plaintiffs' Exhibit
- IRX: Intervenors' Rebuttal Exhibit (cross examination)
- DX: Defendants' Exhibit
- IX: Intervenors' Exhibit
- PRX: Plaintiffs' Rebuttal Exhibit (cross examination)

The witnesses who presented statements for the defendants were not cross examined.

⁷ Decades of legal proceedings in the crew consist dispute resemble a monstrous opera on tour, with the same witnesses repeatedly taking the same positions for the same parties. In addition to the 1963 and 1965-66 congressional hearings and the many Arkansas full crew law cases, see, e.g., REPORT, PRESIDENTIAL RAILROAD COMM. (1962), PX 19; *Brotherhood of Locomotive Engineers v. Baltimore & O. R.R.*, 372 U.S. 284 (1963); Arbitration Award No. 282, 41 Lab. Arb. 673 (1963), PX 20; *Brotherhood of Locomotive Firemen v. Chicago, B. & Q. R.R.*, 225 F.Supp. 11 (D.D.C. 1964), *affmd.*, 331 F.2d 1020 (D.C.Cir. 1964), *cert. den.*, 377 U.S. 918 (1964); *New York Cen. R.R. v. Lefkowitz*, 259 N.Y.S. 2d 76 (Sup.Ct. 1965), *affmd.*, 282 N.Y.S.2d 68 (App.Div. 1967) (New York full crew law case); A. 248-50, 281, 346-47, 373, 500-04. Administrative tribunals regularly find "that firemen are presently performing useful services," that crew size "necessary to assure safety and to prevent undue work loads must be determined primarily by local conditions" and similar factual conclusions that in themselves support state legislative action. *E.g.*,

(*Railroad Work Rules Dispute*), 88th Cong., 1st Sess., 491-96, 631-34 (1963); *Hearings on H.J. Res. 565 (Railroad Work Rules Dispute)*, 88th Cong., 1st Sess., 711-23, 996-99 (1963). The following exchange took place, for example, between the Chairman of the House Interstate Commerce Committee and a brotherhood representative:

THE CHAIRMAN. Before the gentleman leaves, and for my own information, I would like to raise the question: Why is it considered in one jurisdiction necessary to have a different consist of crews from another jurisdiction?

MR. WAGNER. Mr. Chairman, that is one of the complications that we run into in our work. As I said in my testimony and in my statement, you have different conditions on different divisions on the same railroad. The men work under different conditions. You have mountainous territory. You have the deserts. You have railroads where there is a lot of curves, especially in switching operations in industrial plants. There are not two that are the same. For that reason you have the difference in the crew consist. If you were referring to State laws, Mr. Chairman, I believe that could be answered in this manner: that the lawmakers in the various States evidently were convinced, and feel, that a law of that kind is necessary in order to protect the public that we are talking about here today. There are crossings.

THE CHAIRMAN. I am compelled to make the statement now, Mr. Wagner, I wish it was the general policy throughout the Government to give greater recognition to the application of the State laws based on what they think is necessary in those areas.

PX 20, Arbitration Award No. 282, 41 Lab. Arb. at 688; 694. The railroads continue to initiate court suits in spite of their constant result: although the preponderance of evidence may permit reduction of crews, the issue is not so clear that the Constitution deprives states of power to conclude otherwise.

Hearing on H.J. Res. 565 (Railroad Work Rules Dispute), 88th Cong., 1st Sess., 837-38 (1963).

It was that same committee chairman, Representative Harris of Arkansas, who announced on the House floor that the committee had considered state full crew laws, including their validation by this Court, and concluded: "The committee does not intend that any award made under this section may supersede or modify any State law relating to the manning of trains." 109 Cong. Rec. 16122 (1963); H.R. REP. No. 713, 88th Cong., 1st Sess. 14 (1963). See also *Brotherhood of Locomotive Engineers v. Chicago, R.I. & Pac. R.R.*, *supra*, 382 U.S. at 433-37.

After passage of Public Law 88-108 in 1963 to resolve a particular collective bargaining crisis on the crew consist issue (382 U.S. at 433), Congress has had occasion to review the results of its efforts. In hearings before the Senate Committee on Commerce, the subject of state full crew laws again was raised; attention was called to the 1966 decision of this Court in this case. *Hearings on the Administration of Public Law 88-108 (Railroad Work Rules Dispute)*, 89th Cong., 2nd Sess. 1005, 1021-23 (1966). The alarming recent national increase in railroad accidents has been noted. 114 Cong. Rec. S3987 (daily ed. April 10, 1968). To date, additional federal legislative action has not been taken.

II. THE CHALLENGED STATUTES HAVE RECEIVED CONSISTENT AUTHORITATIVE JUDICIAL VALIDATION IN RESPONSE TO LEGAL CONTENTIONS IDENTICAL TO THOSE AT BAR.

A.

From their inception, Arkansas full crew laws have been under persistent attack by railroads to which they apply. Shortly after the passage of the full freight crew act in 1907, a multifarious challenge to its constitutionality was rejected by the Supreme Court. *Chicago, R.I. & Pac. Ry. v. Arkansas*, 219 U.S. 453 (1911).

The first plaintiff in the instant case asserted in 1911 that its trains had modern equipment such as automatic couplers and air brakes so that hand coupling by a brakeman was not necessary, that there were no duties to be performed by a third brakeman, and that the statute requiring employment of three brakemen forced it to spend a large amount of money for a useless purpose. 219 U.S. at 458-59. Violation of the due process and equal protection clauses of the Fourteenth Amendment and the commerce clause were urged.

The Court found the constitutional questions settled by its former decisions on various state railroad laws; lengthy discussion was deemed unnecessary.

As to the commerce clause, the statute was "enacted in aid, not in obstruction" of those traveling in interstate commerce. "Beyond doubt, passengers on interstate carriers while within Arkansas are as fully entitled to the benefits of valid local laws enacted for the public safety as are citizens of the state." 219 U.S. at 465-66.⁸

The railroad equal protection argument apparently was based on the statutory exemption for companies with less than fifty miles of track. Referring to an earlier case, *New York, N.H. & H. R.R. v. New York*, 165 U.S. 628 (1897), which had approved a fifty mile railroad classification, the Court held that "the statute being applicable alike to all belonging to the same class, there is no basis for the contention that there has been a denial of the equal protection of the laws." 219 U.S. at 466.

The due process point was discussed in terms which became familiar in subsequent years.

⁸ Preemptive effect of the commerce clause also was discussed. Until Congress takes "entire charge of the whole subject of the equipment of interstate cars . . . the statutes of the State, not in their nature arbitrary, and which really relate to the rights and duties of all within the jurisdiction, must control." 219 U.S. at 466.

Under the evidence, there is admittedly some room for controversy as to whether the statute is or was necessary; but it cannot be said that it is so unreasonable as to justify the court in adjudging that it is merely an arbitrary exercise of power and not germane to the objects which evidently the state legislature had in view. It is a means employed by the State to accomplish an object which it is entitled to accomplish, and such means, even if deemed unwise, are not to be condemned or disregarded by the courts, if they have a real relation to that object.

219 U.S. at 436.

Undaunted, the railroad launched substantially the same attack on the 1913 Arkansas full switch crew statute. Again, and more summarily, the Court rejected their constitutional contentions and upheld the legislation. *St. Louis, I.M. & S. Ry. v. Arkansas*, 240 U.S. 518 (1916).

The employer contended that the statute violated the due process and equal protection clauses of the Fourteenth Amendment and that "it operates as an interference with interstate commerce." 240 U.S. at 520. Such grounds, the court noted, were "in effect disposed of by prior decisions." 240 U.S. at 520.

Two new factual elements were urged in support of the equal protection theory: the switch crew law, as opposed to the freight crew law, had no exemption based on the length of trains; and railroads uncovered because of their total trackage switched over the same crossings as the litigant without the crew required by statute.⁹ Both facts were rejected as classifications infirmities.

But the basis of both [statutes] is safety to the public though the urgency in one may not be as great as

⁹ Application of the full switch crew law is also limited to public crossings in urban communities.

the urgency in the other. . . . We have recognized the impossibility of legislation being all-comprehensive and that there may be practical groupings of objects which will as a whole fairly present a class of itself, although there may be exceptions in which the evil aimed at is deemed not so flagrant.

240 U.S. at 521.

It was fifteen years before the next invalidation effort. *Missouri Pac. R.R. v. Norwood*, 283 U.S. 249, 809 (1931); 13 F.Supp. 24 (W.D.Ark. 1933), *affmd.*, 290 U.S. 600 (1933). Missouri Pacific, the principal railroad advocate in the instant case, argued unsuccessfully in 1931 and 1933 that changed operating conditions and congressional action gave new substance to the old due process, equal protection, commerce and supremacy clause contentions.

The Supreme Court issued three *Norwood* orders. In 1931, the issues were presented on pleadings and affidavits. Among other things, the railroads argued, operating conditions were different than when the earlier cases had been decided, roads and equipment had so improved that longer and heavier trains could be operated more safely than earlier lighter trains, trains in other states were being operated safely with crews smaller than those in Arkansas, the law required payment for services and time not needed or used, union contracts with certain brotherhoods in other states permitted smaller crews, and the railroad would save \$600,000 per year if one brakeman could be eliminated. 283 U.S. at 253-54.

The Court affirmed a lower court dismissal. Against a background of general presumed constitutional validity and the specific previous decisions, the "burden is on the plaintiff by candid and direct allegations to set forth in its complaint facts sufficient plainly to show the asserted invalidity." 283 U.S. at 255.

As to commerce, equal protection and due process clause arguments, the record was insufficient to find repugnancy.

There is no showing that the dangers against which these laws were intended to safeguard employees and the public no longer exist or have been lessened by the improvements in road and equipment or by the changes in operating conditions there described. And, for aught that appears from the facts that are alleged, the same or greater need may now exist for the specified number of brakemen and helpers in freight train and switching crews. It is not made to appear that the expense of complying with the state laws is now relatively more burdensome than formerly.

283 U.S. at 255.

Rejection of the preemption argument featured reasoning that came to be critical in subsequent legislation and litigation. 283 U.S. at 256; *Brotherhood of Locomotive Engineers v. Chicago, R.I. & Pac. R.R.*, *supra*, 382 U.S. at 429, 434.

But the tenacity of the railroads was not exhausted. The Court agreed to modify its original *Norwood* judgment to be without prejudice to amendment of the District Court pleadings. *Missouri Pac. R.R. v. Norwood*, 283 U.S. 809 (1931). After amendment, 1900 pages of testimony, and 100 exhibits, the statutes were upheld again. *Missouri Pac. R.R. v. Norwood*, 13 F.Supp. 24 (W.D.Ark. 1933).

The three judge *Norwood* court delineated the issues.

With commendable perseverance, counsel have argued the validity of these laws as violating the Interstate Commerce provision of the Constitution, as invading a field occupied by congressional regulation of interstate commerce, and as violating the Fourteenth Amendment. We deem all of these issues settled by

the above three decisions [*Chicago, R.I. & Pac., St. Louis, I.M. & S., and Norwood*] of the Supreme Court, except one. That issue arises under the Fourteenth Amendment.

13 F.Supp. at 25. Evidence was limited to two lines of inquiry:

. . . changes in conditions alleged in the amended petition which would tend to show that the dangers to the employees of plaintiff or to the public, against which the statutes here in question were intended to guard, no longer exist or have been so materially lessened as to render the statutes unnecessary and arbitrary under present conditions . . . [and] that the expense of complying with these statutes is now relatively so much more burdensome as to render compliance therewith at this time unreasonable.

13 F. Supp. at 25.¹⁰

The trial court proceeded to a careful and comprehensive examination of the evidence. General policies, equipment, roadbed and trackage, operating practices including duties of trainmen, and costs were subjected to detailed scrutiny. 13 F. Supp. at 26-37. Finally, as to the narrow open issues, the court concluded that the full crew laws were not "clearly unreasonable and arbitrary," that the

¹⁰ In what has become a familiar ritual, the position of the parties on these two issues was described as follows: "Plaintiff regards the evidence as showing that there have been such improvements in roadbed, equipment, safety training and devices, and operating conditions that smaller crews can now perform these freight and switching services with entire safety, and with even less danger of injury to the crew and to the public than the number required by these laws, and that the expense has become so burdensome as to interfere with other necessary calls upon its limited resources. Defendants concede that considerable improvement has been made, but contend that some of this has only affected (not removed) hazards, while other changes have positively increased the hazards, and that there remains a necessity for the full crews." 13 F.Supp. at 26. Compare 382 U.S. at 427; A. 1192.

railroad was not "deprived of property without due process of law, and that the statutes are valid." 13 F. Supp. at 37. The Supreme Court affirmed, observing merely that there was "no reason to disagree with the determinations of fact reached by the District Court." 290 U. S. 600 (1933).

During the interval between *Norwood* and the instant case, the railroad campaign was further undermined when this Court cited its Arkansas full crew law holdings with approval in a basic commerce clause decision. *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 779 (1945).

The latest consideration of Arkansas full crew laws by the Court furnishes additional guidance. Collateral contentions of each side were rejected by the Court in language which indicates limits for the current controversy. *Brotherhood of Locomotive Engineers v. Chicago, R.I. & Pac. R.R.*, *supra*.

The brotherhoods and the state argued that the commerce, due process and equal protection clause contentions of the complaint were so insubstantial as a matter of law that a three judge court was not justified; that contention was rejected. "Whatever the ultimate holdings on the questions may be," Mr. Justice Black declared, "we cannot dismiss them as insubstantial on their face." 382 U. S. at 428. "The pleadings, therefore, at least to some extent, presented factual issues falling for the introduction and determination of evidence under prior holdings of this Court." 382 U. S. at 427.

The railroads also urged summary invalidation grounded on the mileage classification of the full crew laws. "Aside from the fact that such an argument was apparently rejected in the prior cases upholding the constitutionality of the Arkansas statutes," the Court replied, "we think it is wholly without merit." 382 U.S. at 437.

B.

Arkansas courts, of course, have placed great interpretive reliance on the Arkansas full crew law decisions of this Court. *E.g.*, *Kansas City S. Ry. v. State*, 116 Ark. 455, 174 S.W. 223 (1915); *Hope v. Hall*, 229 Ark. 407, 316 S.W. 2d 199 (1958). Application of the mileage classifications, for example, has been in light of approved power to protect the "health, safety and welfare" of the public. *Kansas City S. Ry. v. State*, 116 Ark. 455, 174 S.W. 223 (1915); *Kansas City S. Ry. v. State*, 213 Ark. 906, 214 S.W.2d 79 (1948).¹¹

But principles settled in the cases arising in Arkansas have had impact far beyond the borders of that state. Particularly during the newest round of railroad challenges in this decade, validation of state crew laws on constitutional grounds has been regular in other jurisdictions because of the 1911-66 Arkansas decisions of this Court.

The trial court opinion in *New York Cen. R.R. v. Lefkowitz*, 259 N.Y.S.2d 76 (Sup.Ct. 1965), *affmd.*, 282 N.Y.S.2d 68 (App.Div. 1967), is a most persuasive analysis.¹² Its

¹¹ Statutory terms such as "public crossing" and "yard" have been defined recently in terms of extant conditions of railroading. *Chicago, R.I. & Pac. R.R. v. State*, 224 Ark. 622, 275 S.W.2d 646 (1955); *St. Louis, S.F. Ry. v. State*, 215 Ark. 714, 223 S.W.2d 186 (1949); *Kansas City S. Ry. v. State*, 194 Ark. 80, 106 S.W.2d 163 (1937). In *Missouri Pac. R.R. v. Moore*, 210 Ark. 643, 197 S.W.2d 284 (1946), the Arkansas Supreme Court reversed a personal injury award because of its judgment that the full switch crew need not all be at the same place at the same time; the conductor was in the depot. In *Cook v. Kansas City S. Ry.*, 212 Ark. 253, 205 S.W.2d 441 (1947), the court rejected a railroad argument that its tax rate should reflect unspecified costs of compliance with the full crew laws.

¹² The New York full crew law trial consumed most of four months, with 6000 pages of testimony by 110 witnesses and tens of thousands of pages of exhibits; the unanimous affirmance of the Appellate Division is now on appeal to the New York Court of Appeals. Brief for Defendants-Intervenors-Respondents at 2, *New York Cen. R.R. v. Lefkowitz*, N.Y.Ct.App. (1968).

preemption conclusion accurately foreshadowed the 1966 result in the instant case. On commerce, equal protection and due process clause contentions, the court examined extensive facts on a legal framework constructed by Supreme Court validations of the similar Arkansas requirements.

On commerce clause issues, the court relied on the three Arkansas full crew law cases in this Court, and their express reaffirmation in *Southern Pac. Co. v. Arizona*.

Insofar as the laws' impact on foreign or interstate commerce is concerned, the full crew laws were not unconstitutional when enacted, and the evidence does not establish that when applied under present conditions they have any greater or different impact on commerce than they had at that time. . . .

259 N.Y.S.2d at 107.

The court considered two equal protection issues: the mileage classification which determines coverage, and the relationship between the railroad and other transportation industries. The former, it held, was concluded by the prior Supreme Court decisions. 259 N.Y.S.2d at 105. As to the latter:

That the full crew laws single out the railroads from other competing forms of transportation may seem unfair, and even unwise, but there are obvious differences between railroads and other forms of transportation, both in relation to methods of operation and relations to the public, and statutes regulating railroad operations do not deny equal protection of the laws merely because they do not purport to regulate other forms of transportation.

259 N.Y.S.2d at 104.

The New York court approached the due process issue as had the *Norwood* trial court in 1933. Compare 259

N.Y.S.2d at 104 with 13 F.Supp. at 37. The massive record did not establish, it concluded, that dangers at which the statutes were directed had lessened to the point that they are unnecessary and arbitrary, or that cost of compliance is now relatively more burdensome so that compliance is now clearly unreasonable.

The Supreme Court of Indiana, the following year, was not as patient with the interminable railroad constitutional contentions. *Public Service Commn. v. New York Cen. R.R.*, 216 N.E.2d 716 (Ind. 1966), *cert. den.*, 385 U.S. 843 (1966). On the only new issue, preemption by Public Law 88-108 of 1963, the decision had been delayed until the Supreme Court ruled in the instant case. 216 N.E.2d at 720. As to due process allegations, the complaint was dismissed without full trial.

In any event the alleged improvements in technology and operating changes cannot here be used to justify a reduction in appellees work force. Such relief, if justified, is properly found in the legislature and not the courts.

216 N.E.2d at 723.¹³

The other recent decision on constitutional aspects of full crew laws was issued in Ohio in 1967.¹⁴ *Akron, C. & Y.*

¹³ *Certiorari* was denied, even on the limited question of permitting evidence. Motion to Affirm at 72.

¹⁴ The railroads rely on an "unreported opinion of the circuit court of Dane County, Wisconsin . . . published on September 7, 1967," and a "District Court of Jefferson County, Nebraska, unreported Memorandum published January 19, 1965." Motion to Affirm at 75, 78. Apparently they are unavailable for analysis. See A. 346-47, 502-03. Even in the era of *Pennsylvania R.R. v. Driscoll*, 9 A. 2d 621 (Penna. 1939) (see Motion to Affirm at 66), results of full crew challenges were inconclusive. See, e.g., *San Francisco v. Market St. Ry.*, 98 F.2d 628 (9th Cir. 1938). The Wisconsin Supreme Court, consistent with *Norwood* and resolution of the three judge court issue in the instant case, held

R.R. v. Public Utilities Commn., 224 N.E.2d 169 (Ohio Ct. Comm.Pl. 1967). The usual contentions of the railroads were rejected on the basis of the Supreme Court decisions in the Arkansas cases, and the failure of the railroads to sustain their burden of showing that the prevailing Supreme Court rules were inapplicable to current practices.

As to equal protection, the legislation is valid because it should be upheld "if any state of facts reasonably can be conceived that would sustain it." 224 N.E.2d at 175. As to the commerce clause, the statutes were not unreasonable when enacted, "and the evidence does not establish that when applied under present conditions, they have any substantial different impact on commerce." 224 N.E.2d at 176. As to due process, "The court further concludes that the dangers sought to be avoided when the statutes were enacted, have not lessened to such an extent that the minimum crew requirements are now clearly unreasonable and arbitrary." 224 N.E.2d at 175.

C.

In sum, the long legal dispute over the Arkansas full crew laws permits current inquiry into two groups of facts: (1) changes in railroad technology and practices which affect functions of the crew required by the challenged statutes, and (2) costs of compliance with the challenged statutes in light of such effect. See *Missouri Pac. R.R. v. Norwood*, *supra*, 13 F.Supp. at 25.

that an allegation that changed circumstances render full crew laws unconstitutional is sufficient for trial." *Chicago & N.W. Ry. v. LaFollette*, 135 N.W.2d 269 (Wis. 1965). "At the outset," the court noted, "it should be observed that we express no opinion as to the merits of the [railroads'] case." 135 N.W.2d at 278.

III. THE RAILROADS HAVE FAILED TO PROVE THAT THE CHALLENGED STATUTES HAVE BECOME UNNECESSARY AND ARBITRARY UNDER PRESENT CONDITIONS.

A.

In spite of their massive and glittering presentation, the railroads have failed to prove that contemporary technology and practices have reduced the dangers at which the statutes are directed to a degree that requiring a fireman or three brakemen has become unconstitutionally arbitrary.

Discussion of the evidence can be organized by duties of the enginecrew (engineer and fireman), duties of the traincrew (conductor and brakemen, or foreman, and helpers in a switching crew), and railroad equipment and facilities.

The conversion from steam powered to diesel electric powered locomotives has been the biggest single railroad equipment change since *Norwood*. But the change did not render obsolete either the fireman or his duties: the fireman now is charged, as the fireman has always been, with maintenance of the motive power, lookout, relief, inspection and emergency duties. IX 1-4, 7-9, 11-17, 24-26, 29-33.

It has always been a primary duty of firemen to maintain the motive power; "maintaining" has included shoveling coal on a hand fired steam engine (A. 335), watching and adjusting steam gauges, water glasses and fuel valves on mechanical stoker and oil burner fired steam locomotives (A. 335-37), and answering alarms and correcting malfunctions on diesel electric locomotives. A. 322-23.

Specific duties of the fireman began changing long before the advent of the diesel. The fireman did not shovel coal into a firebox on the mechanical stoker or the oil

burner locomotives. By 1929, much Missouri Pacific motive power consisted of mechanical stoker and oil burner fired steam locomotives. 13 F. Supp. at 26-27. The other railroads probably converted earlier; Texas and Pacific operated only oil burners by 1916 (A. 650), and the mechanical stoker fired steam locomotive came into use in 1905. A. 652.

At the time of *Norwood*, Missouri Pacific used 1041 freight and switch steam locomotives. 13 F. Supp. at 26-27. Each was manned by an engineer and a fireman, and the motive power on most trains was a single locomotive. In those instances in which two locomotives were used on a single train, each was manned by an engineer and fireman, or a total enginecrew of four. A. 173, 713.

In 1966, Missouri Pacific operated 684 freight, switch and multi-purpose locomotives. PX 82, Ex. A. Motive power for a modern train may be one to ten or more diesel engines. A. 713. This multiple power complex is manned by an enginecrew of one engineer and one fireman. The change has resulted in vastly more efficient use of equipment and manpower, and, in turn, vastly more responsibility for both enginecrew employees.¹⁵

The responsibility has many facets. In addition to instructions contained in the Uniform Code of Operating Rules, general orders, general notices, time tables and instruction booklets, the enginecrew must abide by individual train orders, any number of which may be issued to regulate the movements of each train.¹⁶ A. 327-30, 1036-37; IX 12, p. 4.

¹⁵ As the average engine consist is three per train (see PX 15, 17), if all 684 diesel engines which Missouri Pacific owns were operating simultaneously, only 228 enginecrews (456 employees) would be needed. In contrast, the 1041 steam engines used at the time of *Norwood* required 1041 enginecrews (2082 employees).

¹⁶ The Uniform Code of Operating Rules is furnished to each operating employee and contains 132 pages of rules organized as

There is nothing amorphous about the evidence of actual exercise, by the engineer *and* the fireman, of their joint responsibility to maintain the motive power in operational condition. A. 1014-18; IX 11, p. 8; IX 14, p. 2; IX 25, p. 2. Some malfunctions can be located and remedied only by the action of two men. A. 324, 555-56; IX 25, pp. 2-3; IX 26, pp. 8-9. It takes two men to start some engines after they have died for any reason. A. 1018; IX 25, p. 4. Although the Missouri Pacific may instruct firemen not to move between certain types of locomotives while a train is in motion, it is done in practice in order to avoid delay. A. 357. Missouri Pacific does not prohibit this activity on all locomotives, and most other railroads do not ban it at all. A. 547, 770, 1009, 1138; IX 32, p. 8.

The number of stops which an engineer would make in the absence of a fireman would multiply the chances of "slack action," a hazard to employees at the time of *Norwood* and admittedly still a hazard. A. 105-06, 319-22, 363-64, 565. Slack action occurs most frequently when a train is either being stopped or started. A. 325. Since the railroads concede that in the absence of a fireman a train must be stopped each time an alarm sounds to indicate malfunction in the engine consist (A. 553), the presence of firemen is an important factor in preventing slack action injury to persons and property.

General Rules: Operating Rules; Block Signal and Interlocking Rules; Block Signal, Cab Signal and Interlocking Signal Indications; Rules Governing Movement of Trains and Engines by Block Signals; and Other General Rules. "Employees must have a proper understanding and working knowledge of and obey all rules and instructions in whatever form issued, applicable to or affecting their duties," it points out. IX 36, p. 5. A sample timetable contains many additional rules on particular runs applying to movement of trains, priorities among different trains, yard limits, maximum speeds at different locations, and clearances. IX 37. A third set, train orders, covers specific trains on specific days, instructing on special speed limits, protection deficiencies, colors of lights and flags to be used, and special duties of given members of the crew. *E.g.*, IX 2, Ex. A, B. See A. 639-40, 642, 1037-38.

A most vital function of firemen continues to be keeping a lookout ahead for people, vehicles, track conditions, signal indications, crossings and other conditions which might affect the movement of the train. See A. 326-28, 1014-18; IX 15, p. 2; IX 32, p. 7. Visual inspection of the train to the rear reveals problems such as dust indicating dragging equipment, smoke indicating a hotbox or sticking brake, shifted loads, protruding freight, open or swinging doors, and off-center freight cars. A. 326-27, 1017; IX 4, p. 3; IX 15, p. 3; IX 31, p. 3.

The fireman is the only other member of the crew who is qualified by training and experience to operate the locomotive in the event of fatigue or disability of the engineer.¹⁷ *E.g.*, A. 1039; see A. 195. The importance of emergency procedures for engineer disability is emphasized by directions of the Presidential Railroad Commission and Arbitration Board 282 that locomotives may not be operated in yard service without a fireman unless equipped with a "dead man" pedal or control. PX 19, p. 50; PX 20, 41 Lab. Arb. at 675. Of the railroads at

¹⁷ The railroads argue that brakemen can perform the duties that firemen perform, but the record fails to reveal that they are trained for critical functions. The only locomotive braking experience or instruction that any of the brakeman witnesses said they had was in the emergency application of the brakes. Further, company rules about the placement of the head brakemen, the movement of firemen, and other aspects of the duties of crewmen which can be changed at will cannot negate the reasoning for a statutory requirement. "Even if it be assumed that in road freight service the head brakemen is in all respects as competent as the fireman to perform and does adequately perform the duties assigned to both which are necessary in the interest of safety, it may not be held that the statutory rule is unconstitutional because the railroad rule adequately protects against the same hazards. Such a holding would subordinate the law-making power of the legislature to the rule-making power of the railroads (*Cf.* Northern Pacific Ry. Co. v. Warner, 77 N.D. 721, 45 N.W.2d 196), and, as has been stated, if compliance with both the rule and the statute involves a burdensome duplication of services, the rule may be changed." New York Cen. R.R. v. Lefkowitz, *supra*, 259 N.Y.S.2d at 98.

bar, Kansas City Southern has no such devices on freight, switch or multi-purpose engines, Missouri Pacific has the device or Vapor alerters on all engines, St. Louis-San Francisco on 254 units representing all but 59 "B" units, St. Louis Southwestern on 60 of its 157 units, and Chicago, Rock Island has 14 units so equipped. Int. 37 in PX-82, 83, 84, 87, 89.

The necessity for firemen in switching and other yard operations was described by engineers, firemen, brakemen and conductors. Other than the engineer, the fireman is the only person in the cab of the locomotive while these operations are being performed. IX 8, p. 5; IX 14, p. 5; IX 26, p. 2. He keeps a lookout for people and vehicles on or near the tracks (A. 1039; IX 9, p. 3; IX 25, pp. 1-2) and at crossings (A. 1039, 1139, 1141-42; IX 8, p. 4; IX 9, pp. 2-3), takes signals from crewmen on his side of the train and relays them to the engineer (A. 1017, 1039; IX 8, p. 4; IX 13, p. 4), relieves the engineer in case of fatigue or emergency (A. 1039, 1060, 1143; IX 4, p. 8), operates the emergency brake valve in case of extreme emergency (A. 1017), and leaves the engine when necessary to protect crossings or aid in switching. A. 1058.

The significance of firemen relaying signals is apparent from consideration of the length of modern freight cars. Twenty-five average cars will extend one-fourth of a mile and four of the newer cars are longer than a football field. See A. 116, 827. Curves, buildings, the train itself and other obstructions make it necessary for every available man to participate in switching operations. Crewmen are on, behind and between cars at various times, making it essential that train movements be made only as signaled. IX 8, p. 4; IX 9, p. 4; IX 13, p. 4; IX 14, p. 4.

Historically, the ranks of firemen have been the only source of competent engineers. IX 15, p. 5. Many present firemen are also qualified engineers. A. 555. On at least

the Missouri Pacific, if a fireman does not pass the Progressive Examination for Locomotive Firemen and Standard Examination for Locomotive Engineers, which he is required to take, he is not only disqualified for promotion; he is dismissed from employment. A. 317; and see IX 38.¹⁸

Repeated assertions of the railroads that firemen perform no valuable function¹⁹ are debilitated by their own documents. The current examination booklet for Missouri Pacific firemen states:

It is the policy of the Missouri Pacific Lines to employ men as firemen who will in time develop such qualifications as are necessary to become locomotive engineers, fully realizing that the duties of an engineer are of such character that only men of the highest intelligence, physical perfection and with a fair education will be eligible for this class of service. Applicants for employment as locomotive firemen must have the equivalent of a high school education. Preference will be shown those who, in addition to a high school training, have some technical mechanical training. Having these qualifications, advancement

¹⁸ Special attention is called to these highly technical examinations, which themselves effectively refute the railroad suggestion that firemen perform little mechanical service. And see A. 555, 1055.

¹⁹ Much of the railroad evidence consists of statements by lower echelon supervisors about trips they made on their lines. PX 1-14, 33-41, 75-76; IRX 1-14, 33-41, 75-76. Without exception, they concluded that because of what they saw on those trips, safe operation is unrelated to the fireman and third brakeman on any trains in the system. There is no indication that these trips were representative of Arkansas railroading; to the contrary, they were taken under the most advantageous weather, traffic and time conditions possible. See, e.g., A. 608; PX 33-41; IRX 33-41. On the other hand, operating personnel who testified for the brotherhoods described specific details of work performed and dangers surmounted because of specific functions of specific members of the crew under various circumstances over extensive periods of time. IX 1-27, 29-35; PRX 1-27, 29-35.

will come to those who are conscientious in the discharge of their duties and who devote a part of their leisure time to study.

.....
In order that engine men [engineers and firemen] may have the benefit of practical knowledge of the construction and the assembling of the different parts of a locomotive, and as an aid to the proper care of the locomotive, while in their charge, all engine service employees are invited and expected to call on the Master Mechanic, Road Foreman of Engines, Air Brake Instructor and General Foreman for enlightenment on any questions that may not be understood by them. They are invited to visit roundhouses and shops for the purpose of obtaining first hand knowledge of how to aid in the upkeep of running repairs, and the proper method of making temporary repairs in break-downs on the road, so that in case of disabled engines, they will possess sufficient knowledge to be able to say just what they can, or cannot do, in the way of making repairs, in order to reach terminals without unnecessary delay, and with as small loss of tonnage as is possible.

IX 38, pp. 2-3.

Even the General Manager for the Southern Division of Missouri Pacific, the lead trial witness for the railroads, asserted that one of his hypothetical "adequate crew" members would be a "brakeman-fireman." A. 187.

Finally, testimony of firemen and engineers offers eloquent support for the value of requiring firemen on contemporary locomotives.

In one of the instances the train was coming down a mountain and around a curve to the left and there was a car on the crossing with a man in it. I informed

the engineer of this and he immediately put on the brakes and he was able to stop the train without serious damage to the automobile and no injury to the man. In the other instance, the engineer and I both saw an automobile move onto a crossing which we were approaching. However, because of the location of the depot, the engineer was unable to see the car stall on the crossing. I informed the engineer of the stalled car and he immediately applied the brakes. We were unable to stop before hitting the car and almost demolishing it but the man and woman who were occupying the car were able to get out just before we collided with the car. I feel that the extra time allowed them by our applying the brakes saved their lives by enabling them to get out of the car in time.

IX 8, pp. 2-3.

In Blytheville on July 2, 1966, we stopped in the clear of a crossing approximately two or three feet from the crossing and the brakemen were working approximately fifteen or so cars back on the engineer's side. A lady drove an automobile up to the crossing and did not see us until she got to the crossing on which we were setting still. She stopped her car real suddenly and her car engine died with the nose of her car setting across the rail on the fireman's side. The engineer released the brakes indicating that he would be going ahead and I called his attention to stop him from making the move. The lead unit of the engine consist was a GP7 and the engineer could not see the car on the crossing from his station in the engine compartment. At Osceola on June 17, 1966, we had stopped our train just in the clear of a public crossing. An elderly woman with a cane started out at a real slow rate of walk in front of us over the crossing. The engineer had the brakes released and just

started ahead when I called his attention to the woman and he stopped the train and avoided hitting the elderly lady.

IX 25, pp. 1-2.

Many of the actions are taken in time to avoid an emergency rather than acting in an emergency. However, one incident in particular does stick in my mind because it was an emergency situation and because prompt action of the man in the fireman's seat prevented the probable death of one person and injury or death to another. This incident occurred in Ft. Smith when I was the engineer on the yard switcher No. 1065. Fireman V. G. Bell had relieved me and was operating the engine and I was sitting in the fireman's seat performing the fireman's duties. Fireman Bell was backing the engine pulling five cars when I saw several women come out of the ArkHome Frozen Food Plant in Ft. Smith and cross our track from that plant to a parking lot. One of these women stumbled and fell and hit her head on the rail and was lying across our track. I hollered to stop and at the same time caught hold of the emergency brake valve and applied the brakes in emergency. The train stopped about fifteen feet short of this woman lying on the track and avoided hitting her and another woman who had gone back to try to pull her off the track. Because of the slight curve in the track and the nose of the engine, Fireman Bell could not see this lady on the track.

IX 13, pp. 5-6. See also, *e.g.*, A. 1153-54; PRX 11, pp. 10-12; IX 32, p. 10.

B.

The most evident conclusion from the evidence on brakemen is that they do substantially the same thing as they

did at the time of *Norwood*, when their function was litigated extensively.

There continue to be various conditions on all railroads which make flag protection necessary. A. 167, 615, 864; IX 5, pp. 5, 10, 14; IX 10, pp. 4, 8; IX 18, p. 5; IX 21, pp. 4-5; IX 32, p. 6. Brakemen still must participate in "flat switching" (arranging cars in proper order to be set out or spotted) when trains are not "blocked" (cars arranged in order in which they are to be set out or spotted).²⁰ A. 172.

All members of the traincrew still have the duty to look out for hotboxes and other defective conditions such as open doors on cars, shifting loads, dragging equipment, sticking brakes and off-center cars. A. 168, 178. Switches still must be thrown manually, even when they are on "remote controlled" sidings. A. 180-81.

In the early 1930's, station agents had the duty of inspecting trains as they passed their locations. A. 166. Because of the closing of many of these stations, however, this inspection has diminished, placing a greater responsibility on members of the operating crew. A. 166; see PX 82, Int. 154, 155; PX 89, Int. 154, 155. Conductors are frequently unavailable to assist in switching operations, as they are required to prepare delay reports (A. 168-69, 1109-11; IX 27, p. 8), wheel reports (A. 170, 1109; IX 27, p. 9), switch lists (A. 170-71, 1109; IX 27, p. 9) and handle reports. A. 169; IX 27, p. 10. Some of these papers are prepared by clerical forces at terminals, but this fact, as most others concerning the functions of brakemen, was also true in 1931. 13 F.Supp. at 31.

The most effective rebuttal of any allegations of changed circumstances for brakemen (or the comparable "helpers")

²⁰ Cars are usually, but not always, blocked by towns, but the cars are not blocked in the proper sequence if there is more than one location for spotting in that town. A. 171-72.

on switching crews) was given on cross examination by a former Arkansas brakeman who, having become a top operating official, was the principal witness for the railroads.

Q Mr. Sheppard, you testified, I believe, that during your days as a brakeman on the Gurdon to El Dorado subdivision [1936 *et seq.*, A. 61] that your duties were to aid in making a set out, pick up the cars, switch cars, keep a lookout, inspect the train, set hand brakes and load and unload L.C.L. freight.²¹ Is that a fair statement of your testimony? A Yes, sir, it is.

Q Mr. Sheppard, does the brakeman still aid in making set-outs and pick up of cars? A Yes, sir.

Q Do the brakemen still aid in the switching of cars? A Yes, sir.

Q Do the brakemen still perform lookout duties? A Yes, sir.

Q Do the brakemen still inspect the trains? A Yes, sir.

Q Do the brakemen still set handbrakes? A On occasions, yes, sir.

Q Don't they set handbrakes each time they set a car out? A No, sir, not each time they set out a car.

Q They might kick it into another car, couple it into another car with the handbrakes set? A If a car is set out on a level track, it is not uncommon to leave it without a hand brake.

Q Nothing to tie it down? A Yes.

Q Other than its own weight? A That is correct. In most cases brakemen will put a piece of wood or some object under one of the wheels if there is a slight grade. If there is a pretty good grade they set hand brakes.

Q Did the brakemen follow this same procedure when most of the cars were equipped with staff or

²¹ Less than car load freight.

stem-winder hand brakes? A Practically the same, yes, sir.

Q Would you say that much of the time the brakemen chocked or scotched the wheels on those cars rather than setting the hand brakes? A It would be difficult to say what percentage of the time. It would depend upon where the work was being performed.

Q Did the loading and unloading of L.C.L. freight take place on a local freight train or a through freight train? A Primarily on local freight trains. It has been handled on through freight trains, and, of course, a through freight train does local work, they convert to local pay. But ordinarily on the regular assigned local freight train.

Q Every train would not have L.C.L. freight, would they? A No, sir.

A. 164-65. See also A. 611-13, 635-38, 1114.

These competent admissions seem decisive.

C.

Railroad evidence on equipment and facilities is characterized by expansive descriptions of modern technology. Closer examination reveals that much of the progress described is in the planning stage, not offering widespread current protection for Arkansas citizens and railroaders. See, *e.g.*, PX 77; IRX 77.

Most important, as to freight cars, couplers, brakes, roadbed and trackage, and crossings, substantially the same hazards discussed by the *Norwood* trial court exist today.

Freight cars are substantially larger with much greater load capacities than they had at the time of the earlier

full crew cases. The average car capacity has increased more than fifty-one percent since 1929. A. 793.


Norwood referred to all cars having "solid brass wheel journal . . . improved journal wedges and improved methods of lubrication and packing of journals (all of which lessens hotboxes and resulting rebrassing and wrecks)." 13 F.Supp. at 28. These stabilized solid bearing assemblies meet current industry standards and are still in use. A. 802. There may have been some further improvement in the lubricating of these assemblies, but the only other change is the use of roller bearings; only about ten percent of American railroad cars are so equipped. A. 802.

Another alleged improvement is the replacement of the arch bar truck sides with one piece cast steel truck sides. These are the same one piece cast steel truck sides which the *Norwood* court recited as being progressively installed since 1926. 13 F.Supp. at 28.

Steel wheels and improved axle designs were being employed at the time of *Norwood*, supplanting cast iron wheels. 13 F.Supp. at 28. But it was not until 1968 that an industry rule prohibiting cast iron wheels on new or interchanged cars went into effect. A. 797-98.

The same situation obtains with respect to other changes in freight car equipment asserted by the railroads here. Steel car ends have been on new cars since 1919 and rebuilt cars since 1926, steel side doors and more secure hangers, steel roofs, and all steel cars or steel underframes were on over seventy-five percent of the cars by 1931, as were steel steps, ladders, ladder guards and handholders. 13 F.Supp. at 28. Even in 1967, some cars still had wooden doors. A. 95, 178.

Improvements in the knuckles and drawbars of modern trains have been offset by the greater stress on these connections since steam engine days. A. 819-20.



Couplers on current freight cars are the same as couplers at the time of *Norwood*. The "E" type coupler was adopted as standard by Missouri Pacific in 1930 (13 F. Supp. at 28), and is still in use by that railroad. A. 805. One Missouri Pacific official testified that the coupler in use now is the "D" type, an older coupler which was standard in 1916. A. 821; 13 F. Supp. at 28. It was mentioned that alloy steel high strength body and knuckles adopted in 1962 were stronger than the "D" type, but there is no assertion of superiority to the "E" coupler or that the newest coupler has been placed on any substantial number of cars. See A. 805. The "yoke" portion of the coupler which is represented to be superior to an earlier fabricated and riveted design is the same yoke mentioned in *Norwood* as having supplanted the riveted design at that time.²² A. 806; 13 F. Supp. at 28.

The principle of the air brake and much of the air brake equipment has not changed since 1931.²³ A. 809-12; 13 F. Supp. at 29-30.

²² A railroad witness also testified that the draft gear "has been greatly improved and strengthened," but specified only improvement in the "cushion underframe." A. 806-07. The cushioned underframe merely protects freight carried on a certain type of car. A. 821. The shock absorbing elements are located between the car body and the center sill assembly, not between the coupler and center sill; a shock, therefore, still is transmitted to the ends of the car. A. 807, 823. As of 1966, even Missouri Pacific had only 3066 cars equipped with the cushion underframe. PX 26, Ex. 1A. Railroad witnesses contradicted each other on the chance of two cars coupling an impact if the couplings on both cars are open. A. 180, 820. When cars are uncoupled from a train the knuckle on only one is opened; there is less chance that recoupling will be automatic, and in many cases it becomes necessary for a crew member to go between the cars and open the other knuckle manually. A. 179. Cushioned underframe cars are especially difficult to couple on curves, requiring manual adjustment of the knuckles or drawbars. A. 180.

²³ Or, perhaps, since 1911. See *Chicago, R.I. & Pac. Ry. v. Arkansas*, *supra*, 219 U.S. at 458. There has been the addition of an air reservoir tank, and new "ABD" equipment is available. A. 810-11. But exaggeration characteristic of much railroad tes-

As to the standard type of braking system, a major railroad witness was asked how long it takes for reduction in brake line pipe to begin after application of air brakes.

Well, the discharge on the ordinary AB brake system is all accomplished right at the locomotive by the enginemen. That air must all bleed from the brake pipe through the valve in the cab of the locomotive. In that way it will take a considerable time for that brake pipe reduction to reach, we'll say, the last car of a seventy-five car train which causes the brakes to apply serially, that is, the cars at the front will apply first and then so on down through the train . . .

A. 823-24. The volume of air which flows through the pipe is limited by the one and one-quarter inch brake train line pipe, the same size used in 1931. A. 714; 13 F.Supp. at 29. The longer the train, the longer this braking process requires. Cf. A. 1182.

"The ideal operation," the *Norwood* court observed, "would be one applying a simultaneous or closely simultaneous and equal braking force on each car in the train." 13 F.Supp. at 29. This ideal was nearly reached from the mid-1930's to 1945, with the HSC, or high speed control electro-pneumatic system. See A. 685-86. This kind of brake system is no longer used, apparently because of its cost. A. 686; Int. 62 in PX 82, 83, 84, 87, 89.

timony is illustrated by a sequence involving one Missouri Pacific official. In his original statement, he declared: "Many new cars are now equipped with the new 'ABD' valves and their effect in the handling of long trains is already evident . . ." A. 811. On cross examination he conceded (1) that "the beneficial effects of the ABD valves are noticeable if you have up to fifty percent of the cars within the train with that," and (2) that Missouri Pacific has "in the neighborhood of fifteen hundred" cars out of a total of 46,991 so equipped. A. 825. It becomes statistically highly unlikely that Missouri Pacific has any present train on which the braking action is affected by ABD valves.

Much other brake equipment described by railroad witnesses here was already in use at the time of *Norwood*.

Other improvements in brake equipment are trussed metal brake beams (progressively applied since 1923) replacing wooden beams, brake hangers and pins increased in size with fixed material of known strength, improved brake rigging (on all new and rebuilt cars since 1924), steel brake shoe heads on engine and tender (on all) lessens breakage formerly experienced.

13 F.Supp. at 30.

Of the 41,618 cars owned by Missouri Pacific in 1931, 15,555 were equipped with the booster type hand brake, which provided more braking power with less manual effort. 13 F.Supp. at 27, 30. Today there are still some cars with the non-booster staff or stemwinder brakes owned by the appellees. *E.g.*, PX 89, Int. 53. But there is one crucial point as to any handbrake: it took one crewman to operate one in 1931 and it takes one crewman to operate one in 1968.

Evidentiary patterns for roadbed and trackage are the same. Although a heavier continuous weld rail is the safest type available, only 188 of the 4535 Arkansas miles operated by the railroads in this case are so equipped.²⁴ In areas where heavy braking occurs and curves are excessive, a special heat treated rail is desirable. IRX 30, p. 7. Missouri Pacific has about five miles of this kind of rail; no information was provided as to the other plaintiffs. IRX 30, pp. 7-8.

A notable similarity with *Norwood* relates to rail weight. In 1931 the heaviest weight rail was 110 pounds. 13

²⁴ Missouri Pacific has 66.10 out of 2329.10 total miles, St. Louis Southwestern 71.29 out of 741.30, St. Louis-San Francisco 50.20 out of 498.31, and Chicago, Rock Island and Kansas City Southern have none out of respective mileages of 812.64 and 154.006. Int. 20, 25 in PX 82, 83, 84, 87, 89.

F.Supp. at 31. Thirty-five years later, the weight of most of the rail used by three of the appellee Arkansas railroads is still about 110 pounds.²⁵

In 1931 Missouri Pacific had automatic signals on 555 miles and manual block on 162 miles of its Arkansas system. 13 F.Supp. at 31. In 1966 Missouri Pacific had centralized traffic control (CTC) signals on 563 miles and automatic block signals (ABS) on 254 miles of a total track mileage of 2329.10. PX 82, Int. 20, 69-71. Three of the remaining appellees have substantially smaller percentages of automatic signal protection; most Arkansas track is "dark railroad," ungoverned by any type of automatic signals.²⁶ See A. 614.

The same pattern appears with much of the other safety equipment which the railroads argue should replace a full crew. Many of the same devices were used in 1931, and in most instances there are important variations among the five active appellees as to actual availability of modern

²⁵ Only 171.5 miles of Chicago, Rock Island track exceeds 110 pounds, and no track exceeds 115 pounds. PX 89, Int. 21-24. As to St. Louis-San Francisco, 304.38 miles is of 110 pound rail or less, and only 142.28 miles 115 pounds or more. PX 84, Int. 21-24. All of St. Louis Southwestern track is of 119 pound or lighter rail except for 11.73 miles. PX 83, Int. 21-24. Sperry Rail Defect Detector cars also were in use in 1931. See Int. 28 in PX 82, 83, 84, 87, 89; 13 F.Supp. at 31.

²⁶ Of 812.64 miles in Arkansas, Chicago, Rock Island has 167.5 miles of automatic block signals and 11.8 miles of centralized traffic control. PX 89, Int. 20, 69, 71. Of 741.30 miles in Arkansas, St. Louis Southwestern has 4.5 miles of automatic block signals and 349 miles of centralized traffic control. PX 83, Int. 20, 69, 71. Of 498.31 miles in Arkansas, St. Louis-San Francisco has 7.2 miles of automatic block signals and 192 miles of centralized traffic control. PX 84, Int. 20, 69, 71. Of 154.006 miles in Arkansas, Kansas City Southern has 60 miles of automatic block signals and 93 miles of centralized traffic control. PX 87, Int. 20, 69, 71. Without such automatic signals, opportunities for human error are multiple. A. 833. CTC and ABS signal indications are still, at times, installed on the fireman's side of the track. A. 864.

equipment to a degree that crewmen become affected.²⁷ A relative reduction of hazards is particularly questionable in view of the longer, heavier and faster trains in operation today. A. 482.

One emphasis of full crew discussion in the past has been safety to the public. A principal incident of such relationship concerns crossings of railroad tracks with public thoroughfares.

As of 1966, 3190 out of 3646 public crossings in Arkansas had no automatic signal protection.²⁸ The relation of this fact to the tremendous increase in highway traffic again illustrates an expansion, not a contraction, of danger to the Arkansas public. See DX 1. Further, delays caused by a smaller operating crew would multiply hazards such as the length and number of times a street crossing is blocked by trains. See A. 325.

The *Norwood* court characterized the 5.6% of crossings protected in 1931 as "a relative few." See PX 27, p. 25;

²⁷ The facts supporting the foregoing discussion show great discrepancies among the appellees as to use of equipment designed to enhance safety. Further, St. Louis Southwestern has thirteen hot-box detectors in Arkansas, Missouri Pacific only three, St. Louis-San Francisco two, and the other plaintiffs none. See Int. 101 in PX 82, 83, 84, 87, 89; A. 168. Missouri Pacific is the only plaintiff with a broken wheel flange detector or a dragging equipment detector in Arkansas. See Int. 112 and 114 in PX 82, 83, 84, 87, 89. Chicago, Rock Island, for example, is in too weak a financial position to afford the equipment it should have. A. 787, 791. See also IRX 29, 77; REPORT, PRESIDENTIAL RAILROAD COMM. 56 (1962), PX 20. Surely the people of Arkansas are entitled to be protected against the hazards of the least safe railroad.

²⁸ Out of a total of 1747 public highway and street crossings over Missouri Pacific tracks in Arkansas, 1507 have no protection. Out of 597 for Chicago, Rock Island 534 are unprotected, out of 623 for St. Louis Southwestern 539 are unprotected, out of 517 for St. Louis-San Francisco 463 are unprotected, and out of 162 for Kansas City Southern 147 are unprotected. Int. 80 and 87 in PX 82, 83, 84, 87, 89. Private crossings, generally unprotected, are not included in these totals. See, e.g. A. 868-69, 1011-14, 1105; IRX 29, p. 11.

13 F.Supp. at 34. The 12.5% protected in 1966 must bear the same description.

The railroads have failed to prove that the challenged statutes have become unreasonable and arbitrary under present conditions. Relevant *changes* in railroad technology and practices have been minimal in kind, and not significant in degree when concurrent expansion of other hazards is taken into account.²⁹

IV. THE RAILROADS HAVE FAILED TO PROVE THAT THE COST OF COMPLIANCE WITH THE CHALLENGED STATUTES HAS BECOME UNREASONABLY BURDENSOME UNDER PRESENT CONDITIONS.

A.

The most dramatic failure of proof in the case against the full crew statutes is with respect to cost of compliance, a vital component of the railroad challenge under any constitutional theory.

The railroads simply add up the pay and fringe benefits of one fireman and one brakeman for each Arkansas operation in a selected year, and conclude:

The evidence shows that the Arkansas statutes impose an annual cost burden on the appellee railroads,

²⁹ An important expanded hazard stems from the nature of the substances transported. The railroads concede that they are carrying more volatile and dangerous material than they did thirty years ago. A. 187. "There is a continuing and substantial expansion in the quantities and varieties of chemicals transported in interstate commerce. When such shipments are involved in an accident, there are increased hazards and the potential of extensive loss of life and property damage." 79 ICC ANN. REP. (1965), IX 44, pp. 6-7. "Since the end of World War II, the production of industrial chemicals has increased 350 percent. Last year alone there was a 12 percent increase in the consumption of commercial explosives over the previous year The shipment of rocket and missile fuels is increasing each year. To add to this picture of known problems, there are about 25 new dangerous commodities developed each day." 80 ICC ANN. REP. (1966), IX 45, p. 6. The greater length of modern freight cars increases chances of derailment. A. 826-27.

which would be eliminated in the absence of the statutory provisions, of approximately \$7,600,000.00. Motion to Affirm at 62. See PX 43-45, 81, 85, 86, 88; IRX 43, 81, 85, 86, 88.

The evidence shows nothing of the kind.

To the contrary, the record establishes two things with respect to cost of compliance: (1) the railroads have failed to present any facts from which general cost of compliance can be estimated, and (2) from raw data accidentally made available, the only arithmetic conclusion is that such cost is minimal if extant at all.

The railroads cannot claim surprise about the scope of their problem.³⁰ The warning of this Court in *Norwood* was explicit: it is not enough to assert that the expenditure of a flat sum of money is required for compliance.

It is not made to appear that the expense of complying with the state laws is now relatively more burdensome than formerly. Greater train loading tends to lessen operating expenses for brakemen. There is no statement as to present efficiency of switching crews compared with that when the 1913 Act was passed, but it reasonably may be inferred that larger cars and heavier loading of today make for a lower switching expense per car or ton.

283 U.S. at 255. Although it is clear that the number of tons per employee loaded today is much higher than it was at the time of earlier cases (see A. 1162), the railroads did not present a shred of evidence to establish the ratios delineated by *Norwood*.

³⁰ The Missouri Pacific cost of compliance statistician testified: "There are many different approaches to determining the answer to the cost problem and some of them are as equally valid as others and yet seem to be dissimilar in their approach." IRX 85, p. 7. Cf. also *Cook v. Kansas City S. Ry.*, 212 Ark. 253, 263, 205 S.W.2d 441, 445-46 (1947).

B.

From what amounted to an accidental disclosure by one railroad statistician, however, some specific idea of the cost of compliance is available from the record. The compelling result of the process is that such cost is minimal at most.

The simplest deficiency in the railroad presentation, recognized by the court below, is that it failed to take into account most offsets that would increase costs following the elimination of members of the crew. A. 488, 1204. The gravity of this omission is established for at least one of the appellees. See A. 487-98, 1184-87; PX 86; IRX 86.

Officials of the Kansas City Southern included in their pre-trial testimony some detailed and validated working figures used during cost of compliance calculations. PX 86; IRX 86. It thus became possible to determine relative changes in per mile enginecrew and traincrew costs in Arkansas under the full crew laws, as compared with other states where crews have been reduced substantially in the last four years. See A. 244-45.

As to freight enginemen, the percentage cost for Arkansas compared with the system as a whole actually *declined* between 1962 and 1965, the period spanning the arbitration award which eliminated most firemen outside of Arkansas. A. 1186 (24.7%, 23.6%, 24.1%, 23.0%). As to freight trainmen, the same result obtained. A. 1187 (22.1%, 22.0%, 22.2%, 21.6%).

Lest the above figures be dismissed as possibly reflecting some change in total mileage, the per mile expenditure is also available. Most significantly, in the 1962-65 period, the ratio of Arkansas to the Kansas City Southern system as a whole went down as to enginemen (1.119, 1.066, 1.118, 1.080) and rose only slightly as to trainmen (1.000, .992, 1.029, 1.014). A. 1186. The decline in both cate-

gories between 1964 and 1965 merits special attention because of the graduated effects of the May, 1964, arbitration award. See A. 244-45.

These figures, the only ones in the record besides "assertions" interdicted by *Norwood*, compel the conclusion that cost of compliance is minimal, if measurable at all.³¹

This startling, conclusion does invite further inquiry; there is evidence in the record to indicate what some of the offsets might be.

First, even the railroads, in unfettered exercise of management discretion, at times would use crews larger than the four men which their cost of compliance figures contemplate. See, *e.g.*, A. 188; PX 31, pp. 16-17. "The variation in managerial judgment reflected in these estimates demonstrates differences in opinion concerning the minimum crew consist required for safe and efficient operations, even under similar operating conditions." PX 19, REPORT, PRESIDENTIAL RAILROAD COMM. 57 (1962).³²

A second cost element for trains without a full crew is direct and obvious: engineers who operate without firemen are paid a special compensatory allowance. A. 507-08. Further, Arbitration Board 282 provided for extensive costs in connection with employment separations resulting from its award. PX 20, 41 Lab. Arb. at 676-77, 679-80.

There are more permanent offsetting costs; their magnitude is indicated by the Kansas City Southern figures. A. 489-91.³³ Virtually all witnesses agree that a smaller

³¹ Suggestions by railroad counsel that the *brotherhoods* should have obtained similar figures for other appellees (A. 540-42) ring hollow. Cf. *Goldblatt v. Hempstead*, 369 U.S. 590, 595-96 (1962).

³² For even the short slow trains running on small lines uncovered by the full crew laws, five and six man crews are not unusual. PX 47, 48, 49, 58, 60, 65, 66.

³³ Counsel for the railroads summarized the factors as "the increasing accidents and the overtime and the additional switching en route, the terminal delay, the effect of the conversion rule, and

crew increases operating time for a given train.³⁴ Slower operation means decreased efficiency and increased cost per unit generally; it means increased overtime pay, "progressive" and "constructive" allowances for members of the smaller crew specifically. See A. 489-91. The evidence shows that accidents also would increase, resulting in repair and replacement cost for equipment and tracks, damage to freight, the cost of clearing wrecks and higher insurance premiums and personal injury judgments. See A. 129-30, 488-89; 1166-70.

The probative deficiency decimates the challenge at bar.

V. THE CHALLENGED STATUTES ARE REASONABLY RELATED TO STATE INTERESTS IN THE OPERATION OF ARKANSAS RAILROADS.

A.

The record reveals more than the absence of changed conditions sufficient for reversal of traditional full crew validation. Affirmatively, preponderant evidence on railroading and safety supports the retention of full crew laws by Arkansas lawmakers.

The instant case offers more opportunity to compare safety experience with and without full crews than perhaps any past litigation. The proceeds of such experience are significant support for the challenged legislative judgment.

Four national statistical conclusions were established³⁵ beyond serious challenge: (1) railroading continues to

a multitude of other factors. . . ." A. 538. See also A. 966. The railroads did offset for the firemen allowed for ten percent of the runs by Arbitration Award 282. *E.g.*, PX 85, Ex. A.

³⁴ See discussion at point V(B), *infra*.

³⁵ Tactically, although the railroad statistician testified first, for the plaintiffs, he conceded that his presentation was to a large degree defensive, in anticipation of proof from the brotherhoods in these areas. See A. 246, 280-81. One of the key railroad exhibits was withheld, for example, until the nature of the cross examination became apparent. A. 304, 1005-07.

be a hazardous business, (2) railroad accidents have increased substantially since May, 1964, (3) operating crews have been reduced substantially since May, 1964, and (4) an outstanding increase in railroad accidents since May 1964, has been in that particular type of accident which usually involves inadequate performance by the operating crew.³⁶

The railroad response, essentially, is that railroad accidents are not increasing as seriously as alleged if measured in terms of gross ton miles, if casualties only are examined, and if changes in reporting factors are considered. Further, the railroads argue, the accident rate had been increasing prior to May, 1964.

In reply, the brotherhoods point out that gross ton miles is an improper exposure factor for measuring human casualties or even train accidents; even an absolute casualty decline has little significance in view of drastically reduced operating crews, nonoperating employees, and

³⁶ Observing that "statistical evidence seldom is" satisfactory, the court below lightly dismisses the evidence of concurrent rising accidents and diminishing crews as without proven causal relationship. A. 1202. This judgment, in particular, seems compellingly legislative. The railroads also point to a report of representatives of the railroads and the Brotherhood of Locomotive Engineers which relies on a 1965 assertion by an ICC official that the Commission had investigated no accident in which it found that the absence of a fireman was a contributing or proximate cause. PX 79, p. 64. This report covered only twenty-three accidents, and was followed by this exchange: "SENATOR CANNON. Then actually it would seem to me that from the very limited investigating that has been accomplished during this period of time and the fact that you have had a tremendous number of accidents, including a very rapidly growing rate, that statement that you previously submitted to the committee . . . is not too meaningful in view of the limited number, would you say? MR. BUSH [Acting Chairman, ICC]. That's right. And I think there again too we have to distinguish between the words 'investigate' and 'inspect' and 'review.'" *Hearings on the Administration of Public Law 88-108 (Railroad Work Rules Dispute)*, 89th Cong., 1st Sess. 302 (1965); IX 67, p. 14. See A. 944-48.

passengers. Finally, the rate of accidents generally, and the rate of particular accidents related to crew consist, have accelerated more sharply since May, 1964, than in prior years.

"Railroading," the court below observed, "is an inherently dangerous business whether it is carried on in Arkansas, Missouri, New York or California." A. 1198-99. See *Missouri Pac. R.R. v. Norwood*, *supra*, 13 F.Supp. at 35.

The contemporary increase in hazards of railroading is established by government records. The ICC reported "an alarming 12.9 percent increase in fatalities for 1964," "a sharp rise in violations of the various railroad safety laws," "a substantial increase in the number of locomotives found in unsafe condition," a "growing menace of highway-grade crossing accidents," and increased hazards through new materials being transported. 79 ICC ANN. REP. (1965), IX 44, pp. 4-7. "The alarming upward trend" in the number of accidents and violations of safety laws continued unabated during the following year. 80 ICC ANN. REP. (1966), IX 45, pp. 3-6.³⁷

Materials made available since the close of trial indicate that the railroad safety problem is becoming even more serious.³⁸

³⁷ The surprising current danger from deteriorating railroad equipment is detailed in A. 1163-65; IX 46, 47 and 48.

³⁸ See, e.g., REPORT, SECTS. OF RAILROAD SAFETY AND LOCOMOTIVE INSPECTION, BUREAU OF RAILROAD SAFETY AND SERVICE, ICC 2-10 (1967). Railroad safety matters have been transferred to the jurisdiction of the Department of Transportation; a short time ago its National Transportation Safety Board released a recommendation which began: "The National Transportation Safety Board's review of data covering the last several years for train accidents shows progressively worsening trends in rates, occurrences, deaths, and damage. Furthermore, and especially disturbing, many train accidents in recent years have involved hazardous or poisonous materials, resulting in fires, or the escape of poisonous

Comparison of relevant spans of time refutes any railroad contention that it is capable of handling its safety problems without state regulation. See, *e.g.*, PX 75, p. 8. Dieselization has not reduced accidents, when periods with the same traffic density are compared. IX 49. There has been a dramatic increase in the percentage of defective freight cars in the last decade as compared with the decade following *Norwood*. A. 1163. About seven percent of the safety appliances on freight cars inspected during fiscal 1965 was found defective. A. 1164. For railroads operating in Arkansas, the percentage of locomotives found defective is significantly higher now than it was in the immediately post-*Norwood* period, and such defects are increasing. A. 1165.³⁹

The railroads have great difficulty explaining the increased hazards. *E.g.*, A. 244-46. Their statistical evidence, generally, was designed to minimize the increase and to refute any causal relationship between that increase and the concurrent national decrease in size of

or hazardous materials followed by evacuation of populated areas. The latter collateral factors, coupled with a rising accident rate, increase the probability of catastrophic occurrences." Natl. Transp. Safety Bd., Release No. 382-7273 (April 10, 1968). See also 114 CONG. REC. S3987 (daily ed. April 10, 1968). A comprehensive railroad safety bill was introduced in Congress by the administration on May 2, 1968, aimed at the "snowballing" accident rate. St. Louis Globe-Democrat, May 23, 1968, at 2C, col. 1.

³⁹ Trains run about fifty percent faster than they did when *Norwood* was decided. A. 1182. There have been comparable percentage increases in their length and weight: A. 1182. In the same time span, the number of motor vehicles in Arkansas has increased by about four hundred percent. A. 1183; DX 1. Many measures of population and property reveal increased exposure to railroad risk. For example, in the state school bus program, initiated after *Norwood* in 1931, 3534 buses now transport 207,013 students over twenty-four million miles. DX 4. In the words of the mayor of one medium sized Arkansas city: "In summary, there are presently more railroad grade crossings, more vehicles, more schools, more children, more people, and more public highways than there has been at any time during the past, and I expect the metropolitan area to continue to develop and increase in size and population." DX 7, p. 6.

operating crews. A. 246.⁴⁰ But the record contains convincing evidence that such causal relationship exists.

Experts for both sides agree that collisions are a particular type of accident which relates most to performance, inadequate performance, or non-performance of the operating crew. A. 281-82, 1166-70. The correlation between the increase in rate of collisions and the reduction of the crew as a result of Arbitration Award 282 is compelling.⁴¹

Causes as well as kinds of train accidents most related to crews size also increased substantially following the May, 1964, award. A. 1175-76. Correlation is further indicated by the fact that as train accidents in all other states rose 34.3% from the 1961-63 average to 1965, the correspond-

⁴⁰ Characteristic of this response is measurement of railroad casualties in terms of billion gross ton miles. E.g., A. 982. Obviously gross ton miles per operating employee or other exposed person has been increasing sharply. A. 255, 481, 1162. Employee hours, on the other hand, is the "standard unit of [casualty] exposure" for the Bureau of Labor Statistics (A. 256-57), the National Safety Council (A. 258), the Interstate Commerce Commission (A. 255-56), and the railroads themselves in other contexts. A. 268-69. Even with the use of distorted exposure factors, however, the railroad statistical presentation conceded that: (1) comparing 1962 and 1966, railroads with more firemen had a smaller increase in collision rate (A. 282); (2) over the longest reported interval, full crew states had better accident and casualty rate experience than non full crew states (A. 283-85); (3) Arkansas train accidents are increasing at a slower rate than those of states with smaller operating crews (A. 286); (4) during periods of the same traffic density, casualty rates for diesel operation were no less than for steam operation (A. 291-93); and (5) comparing pre-1964 with post-1964 experience, Arkansas had a smaller percentage of national casualties in the later era when its crew size was proportionately larger. A. 296.

⁴¹ A. 450-51. May, 1964, marked the inception of a dramatic rise in collisions. A. 1168-69; IX 51, 52, 53. For example, the 1961-63 monthly collision average was 81; 109 was the average for the last eight months of 1964, 115 for the twelve months of 1965, and 114 for the first four months of 1966. The totals for May and June, 1966, the last months for which figures are available, soared to 136 and 137. A. 1168.

ing increase in Arkansas was only 14.3%. A. 1180. Casualties from rail-highway grade crossing accidents in Arkansas actually decreased in recent years, in contrast to a national increase. A. 1181.

The judgment of Arkansas lawmakers in retaining full crew laws should be sustained on the simple temporal juxtaposition of increased accidents and reduced crews in other jurisdictions. But further, the basically undisputed evidence that particular types and causes of hazards related to smaller crews have increased significantly during that time make such policy decision not only constitutional, but also wise.

B.

A particular genesis of hazard, responsive to the size of the operating crew and identifiable at bar, has not been examined in previous full crew law decisions: the problem of speed.

There are two threads of meaning that run through all testimony on the actual operation of a railroad: speed is important for the economic position of the enterprise, and a smaller operating crew necessitates a longer operating time. The practical tension between these considerations itself creates a hazard which the legislature is entitled to regulate.

"Anything that slows or stops a train," declared the major railroad witness, "is an important factor in making a schedule." A. 128. The pressure of economic competition with other forms of transportation "requires fast schedules, non-stop trains, shorter trains" and other forms of expedition. A. 126-27.

While a delay of 5 minutes due to failure of a locomotive may not seem much, we have kept track of delays of 5 minutes or more for many years and have followed them up carefully to determine the exact

cause, ascertain responsibility and take action to prevent such delays in the future.

A. 696-97.

That is the place where competition is exerted—providing better service. It is very important to get the train made up fast, to get the train over the road fast, to have it broken up and the cars delivered to the consignee as fast as possible.

A. 446. See also A. 951.

No witness for any party disputed the proposition that smaller crews take more time to operate a given train. *E.g.*, A. 109, 183-84, 188, 368-69, 604, 645, 752, 877, 1030, 1065-66, 1080, 1087, 1125, 1146. We learn from railroad witnesses, for example, that if a locomotive malfunction occurs without a fireman in the cab, the engineer must stop the train to identify the difficulty. A. 553, 567-68. It takes one brakeman longer to perform necessary inspection duties than two. A. 109. Fewer men may be able to perform certain switching, but they take more time. IRX 6, p. 14.

The coexistence of these two factors: the need for speed and the delays necessitated by smaller crews is an invitation to accidents. The railroads have "eliminated every delay possible," urging crews to perform their tasks as rapidly as they can. A. 183-84. See A. 172. A smaller crew has "to hurry or do some guesswork due to not having enough men." A. 339. Highway crossings tend to be blocked more frequently and for longer intervals. Employee "negligence" of the type which has increased significantly since crews were reduced in 1964 stems from "pressure which comes from that competitive position of the industry." A. 446-47.

The problem is undeniable. The railroads respond: "If more help is required of course we can always add to crew whatever men are needed, depending on the work

to be done." PX 31, pp. 16-17. But the state is entitled to decide that it need not rely on railroad discretion any more than it relies on the prudence of motorists to keep a safe speed on the highways. The chief operating officer of one of the appellees does not even know if his railroad had an increase or a decrease in accidents in the past five years. A. 890. See also A. 919-20. Further, the "alarming" increase in violation of safety laws by the railroads in recent years justifies reluctance to let these enterprises determine what is safe for the people of the state. See, e.g., A. 1163-65.

VI. ANALYSIS OF THE CHALLENGED STATUTES UNDER ANY OTHER CONSTITUTIONAL CHARACTERIZATION ALSO COMPELS JUDICIAL VALIDATION.

A.

The court below held that the statutes make "no significant contribution to railroad safety, . . . are unreasonable and oppressive, and that they violate the Due Process Clause and unconstitutionally burden interstate commerce." A. 1205. (Emphasis added.) Probative value of material evidence should not be affected by this purported double ground for invalidity, for two reasons.

First, there was no apparent effort by the railroads to show that any burden on interstate commerce is *different* now from what it was at the time of the prior Arkansas full crew law cases or the 1945 commerce clause decision in *Southern Pacific Co. v. Arizona*. Record reference to slowing down at state lines to pick up crew members, for example, was without any historical comparison. E.g., A. 123-24. Such specific differences are requisite to independent commerce clause reversal of previous validations.

Second, the court below discusses two elements with "specific regard to the contention . . . that the statutes unduly burden interstate commerce." A. 1205. The fi-

nancial burden of compliance, it found, was out of proportion to the benefit, if any, and the "added burden involved in the taking on and discharging men at or near the Arkansas State line." A. 1205-06. Further, it was held, the challenged statutes interfere with the financial ability of the railroads to compete with other forms of transportation.

The Arkansas statutes in our view militate against that necessary efficiency and flexibility; they hamstring the carriers in the important field of labor relations, and impose upon them requirements not generally imposed throughout the country and not imposed in any of the States bordering Arkansas.

A. 1206. In this sense, also, the court concluded that the statutes constitute an unconstitutional burden on commerce.

This reasoning is subject to the infirmities in due process arguments discussed *supra*. But more, it exemplifies the real meaning of the opinion of the court below: full crew laws are economically unwise. Such conclusion is not for the judiciary, nor is it a basis for a constitutional determination of any kind.

The Memorandum Opinion appears to be a legislative policy determination based upon predisposition.⁴² At odds with the careful *Norwood* District Court analysis is the most direct comment by the court below about the evidence:

The record before us is extremely voluminous. It includes oral testimony, sworn statements, depositions, statistical material, documentary evidence,

⁴² The author of the Memorandum Opinion, while suggesting lines of inquiry to railroad counsel during cross examination of the expert witness for the brotherhoods on complicated statistical material, stated of that testimony: "... as I understood it the major portion of his *pitch*, if I may call it that. . . ." A. 535. (Emphasis added.)

copies of various public documents, photographs and motion picture film? *We make no effort to discuss the evidence in detail.* If the mass of material put into the record by the parties, and *we suspect that much that was put in is surplusage*, is to be evaluated properly, it is necessary for us to define clearly the controlling issue before us.

A. 1198. (Emphasis added.)

A *suspicion* of what the record contains is inadequate at best. When it is followed with definitions of the controlling issue in terms such as "hamstringing the carriers in the important field of labor relations" (A. 1206), the "arduousness" of the Arkansas statute (A. 1195), future traffic on the Arkansas river (A. 1206), and "tying the hands" of the parties in collective bargaining (A. 1207), it is plainly erroneous.

B.

The Supreme Court full crew decisions in 1911, 1916, 1931 and 1933 accurately presaged the dominant attitude towards state economic regulation years later. For the past thirty years, the Court has adhered to a constitutional principle originally appearing in *Munn v. Illinois*, 94 U.S. 113, 134 (1876): "For protection against abuses by legislatures the people must resort to the polls, not to the courts." *Williamson v. Lee Optical*, 348 U.S. 483, 488 (1955).

"Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment." *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937). "[W]here the legislative judgment is drawn in question, [constitutional inquiries] must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it." *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938).

The safety of the public, the safety of railroaders, and even employment conditions on the railroads are clearly of legitimate state concern.

The judgment of the legislature . . . may be a debatable one. It is indeed conceded by the opposition to be such. But if our recent cases mean anything, they leave debatable issues as respects business, economic, and social affairs to legislative decision. We could strike down this law only if we returned to the philosophy of the *Lochner*, *Coppage*, and *Adkins* cases.

Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 425 (1952). See also *Olsen v. Nebraska*, 313 U.S. 236 (1941); *Lincoln Federal Labor Union v. Northwestern Iron Co.*, 335 U.S. 525 (1949); *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966). Heatherington, *State Economic Regulation and Substantive Due Process of Law*, 53 Nw. L. Rev. 13 (1958); Note, 40 MICH. L. REV. 743 (1942).⁴³

The court below rejected out of hand the argument that since the full crew laws amount to business regulation for which there is reasonable support, established limits on judicial evaluation of legislative judgments apply.

We dispose of this alternative contention at this point by observing that the statutes have been characterized as safety measures and nothing else. We accept the characterization of the earlier decisions and find it

⁴³ The facts that the challenged statutes were passed many years ago or have been repealed in some other states should not remove them from the protection of the abstention doctrine. Mr. Justice Frankfurter, concurring in *AFL v. American Sash Co.*, 335 U. S. 538, 553 (1949), noted: "Most laws dealing with economic and social problems are matters of trial and error . . . [and] even if a law is found wanting on trial, it is better that its defects should be demonstrated and removed than that the law should be aborted by judicial fiat." (Emphasis added.) The railroads cannot resist arguing from analogy in legislative repeal of "unjust" full crew laws. A. 711, 950, 993.

unnecessary to decide whether the statutes are sustainable on some other basis.

A. 1192-93.

Rigid demarcation between “economic” and “safety” legislation is belied by the court’s own subsequent discussion, in which it seems highly concerned with the competitive position and labor relations problems of the railroads. Most considerations involved are not exclusively related to either safety or economics. Time pressures, for example, have effects on employee health, business competition, blocking public crossings, and accident rates—a melange of legitimate legislative interests.

But even if, *arguendo*, Arkansas full crew regulations were enacted originally for safety and now are retained to affect quality and quantity of railroad employment, no constitutional infirmity is indicated.

A state legislature, in the enactment of laws, has the widest possible latitude within the limits of the Constitution. In the nature of the case it cannot record a complete catalogue of the considerations which move its members to enact laws.

Carmichael v. Southern Coal Co., 301 U.S. 495, 510 (1936).

[T]he continuation of seventeenth century language does not of itself prove the continuation of the purposes for which the . . . governments enacted these laws, or that these are the purposes for which their successors of the twentieth have retained them and modified them.

McGowan v. Maryland, 366 U.S. 420, 497-98 (1961) (Frankfurter, J., concurring).⁴⁴ See also *East New York Savings*

⁴⁴ Sunday “blue laws” were generated originally from religious considerations, but erosion of this support did not necessarily result in their invalidation. They survive on a general relationship to governmental protection of the “health, safety, recreation and general well-being of our citizens . . . part and parcel of this great governmental concern wholly apart from their original pur-

Bank v. Hahn, 326 U.S. 230, 235 (1945); *Carolene Products Co. v. United States*, 323 U.S. 18, 22-24 (1944).

C.

The railroads announce a plan to argue again that the Arkansas full crew laws have classification infirmities, invoking equal protection and discrimination against interstate commerce theories.⁴⁵ Motion to Affirm at 33, n. 2.

"Aside from the fact that such an argument was apparently rejected in the prior cases upholding the constitutionality of the Arkansas statutes" (*Brotherhood of Locomotive Engineers v. Chicago, R.I. & Pac. R.R.*, *supra*, 382 U.S. at 437, there is ample record support for the classifications involved.

There are eleven interstate railroads which operate in Arkansas; because of the mileage classifications, only eight are covered by the full switch crew statute and ten by the full freight crew statute. PX 67, Ex. A. There are seventeen intrastate railroads in Arkansas; state records indicate that two have sufficient total mileage to be covered by the full freight crew statute. PX 67, Ex. B. But see PX 47, 48. The correlation between mileage and interstate commerce does not on its face indicate hostile discrimination.

There are many obvious factual differences to justify distinction between covered and non-covered railroads.⁴⁶

poses or connotations." 366 U.S. at 444-45. See also *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961); *Braunfield v. Brown*, 366 U.S. 599 (1961).

⁴⁵ The court below found it unnecessary to reach these contentions. A. 1198.

⁴⁶ The switching over the same crossings argument was dealt with in detail in *St. Louis, I.M. & S., Ry. v. Arkansas*, *supra*, 240 U.S. at 521. The mileage classification principle was noted with approval as recently as 1957. *Morey v. Doud*, 354 U.S. 457, 465, n. 8 (1957).

There is a greater need for more crew members for longer trains (e.g., A. 188); record data establishes the greater train length for railroads covered by the statutes than those uncovered.⁴⁷

Speed is also an important consideration to safety; in the only mention of speed for the uncovered enterprises which the railroads adduced, the top limit is thirty-five miles per hour (PX 49), a considerable contrast to the seventy mile per hour plus speeds of the appellees. See A. 892, 899.

The railroads continue to argue cost of compliance. If it is a substantial factor, it is relative cost, and the revenues of uncovered in relation to covered railroads again furnish a basis for the classification. See PX 67, Ex. A, B. Finally, the nature of the business of the appellees is substantially different from that of railroads with 2, 4, 6—or 49—miles of total track. See, e.g., PX 52, Ex. 1, 5.

The other classification argument of the railroads compared the industry generally with other forms of transportation. The treatment of this contention in the New York full crew case leaves little supplement desired. *New York Cen. R.R. v. Lefkowitz*, *supra*, 259 N.Y.S.2d at 104.⁴⁸

⁴⁷ For example, Missouri Pacific averages about twenty-three freight cars for each locomotive, Arkansas Western R. Co., the smallest interstate railroad (not covered by the statutes), about ten cars per locomotive, and Augusta Railroad Co., the smallest intra-state railroad (not covered by the statute), two cars per locomotive. PX 67, Ex. A, cols. 6, 8, Ex. B, cols. 3, 4.

⁴⁸ It should be noted that the Interstate Commerce Commission has limited jurisdiction over railroad safety, a basis for special state attention to the field. "The Commission's responsibilities in the area of railroad safety are limited to the administration of several laws which cover only specific aspects of safety." *Hearings on the Administration of Public Law 88-108 (Railroad Work Rules Dispute)*, 89th Cong., 1st Sess. 291 (1965), IX 67, p. 3. Cf., e.g., 46 U.S.C. § 223 (water); 49 U.S.C. § 304 (highways); 49 U.S.C. § 1421 (air).

CONCLUSION

The brotherhoods and the State of Arkansas respectfully ask the Court to reverse the judgment of the District Court, to order dismissal of the complaint, and to award the appellants their costs and other appropriate relief.

"[T]he clash of fact and opinion should be resolved by the democratic process and not by the judicial sword." *International Bro. of Teamsters v. Hanke*, 339 U.S. 470, 478 (1950).

Respectfully submitted,

JAMES E. YOUNGDAHL

ROBERT D. ROSS

711 West Third Street
Little Rock, Arkansas 72201
Attorneys for the Appellants (950)

JOE PURCELL

ATTORNEY GENERAL OF ARKANSAS

LESLIE EVITTS

CHIEF ASSISTANT ATTORNEY GENERAL
OF ARKANSAS

Justice Building
Little Rock, Arkansas 72201
Attorneys for the Appellants (973)

Of Counsel:

JOHN P. SIZEMORE

McMATH, LEATHERMAN, WOODS & YOUNGDAHL

POPE, PRATT, SHAMBURGER, BUFFALO & ROSS

Little Rock, Arkansas

APPENDIX A

U.S. CONST. art. I, § 8, cl. 3

(The Congress shall have power) . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

U.S. CONST. art. VI, § 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B

ARK. STAT. ANN. §§ 73-720 through 722 (Repl. 1957)
(Arkansas Act 116 of 1907)

73-720. *Crew required on freight trains.* No railroad company or officers of court owning or operating any line or lines of railroad in this State, and engaged in the transportation of freight over its line or lines shall equip any of its said freight trains with a crew consisting of less than an engineer, a fireman, a conductor and three (3) brakemen, regardless of any modern equipment of automatic couplers and air brakes, except as hereinafter provided.

73-721. *Exceptions from Act—Purpose.* This Act shall not apply to any railroad company or officer of court whose line or lines are less than fifty (50) miles in length, nor to any railroad in this State, regardless of the length of the said lines, where said freight train so operated shall consist of less than twenty-five (25) cars, it being the purpose of this Act to require all railroads in this State whose line or lines are over fifty (50) miles in length engaged in hauling a freight train consisting of twenty-five (25) cars or more, to equip the same with a crew consisting of not less than an engineer, fireman, a conductor and three (3) brakemen, but nothing in this Act shall be construed so as to prevent any railroad company or officer of court from adding to or increasing its crew beyond the number set out in this Act.

73-722. *Penalty for violations—Exceptions.* Any railroad company or officer of court violating any of the provisions of this Act shall be fined for each offense not less than one hundred dollars (\$100.00) nor more than five hundred dollars (\$500.00), and each freight train so illegally run shall constitute a separate offense. Provided, the penalties of this Act shall not apply during strikes of men in train service of lines involved.

ARK. STAT. ANN. §§ 73-726 through 729. (Repl. 1957)
(Arkansas Act 67 of 1913)

73-726. Switch crews in cities—Requisite members. No railroad company or corporation owning or operating any yards or terminals in the cities within this State, where switching, pushing or transferring of cars are made across public crossings within the city limits of the cities shall operate their switch crew or crews with less than one (1) engineer, a fireman, a foreman and three (3) helpers.

73-727. Purpose of act—Number in crew may be increased. It being the purpose of this Act to require all railroad companies or corporations who operate any yards or terminals within this State who do switching, pushing or transferring of cars across public crossings within the city limits of the cities to operate said switch crew or crews with not less than one (1) engineer, a fireman, a foreman and three (3) helpers, but nothing in this act shall be so construed as to prevent any railroad company or corporation from adding to or increasing their switch crew or crews beyond the number set out in this Act.

73-728. Application of act to cities of first and second class—Exception. The provisions of this Act shall only apply to cities of first and second class and shall not apply to railroad companies or corporations operating railroads less than one hundred (100) miles in length.

73-729. Penalty for violation of act. Any railroad company or corporation violating the provisions of this Act shall be fined for each separate offense not less than fifty dollars (\$50.00), and each crew so illegally operated shall constitute a separate offense.